Supreme Court, U.S.
FILED
OCT 17 2000
CLERK

(2)

No. 99-1977

In The

Supreme Court of the United States

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ AND
IN DEFENSE OF ANIMALS,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

RESPONSE TO PETITIONER'S WRIT OF CERTIORARI

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6 pp

INTRODUCTION

Respondent, Elliot M. Katz and In Defense of Animals agrees with the Petitioner, Donald Saucier, that a Writ of Certiorari should be granted. There is a significant split among the circuit courts that requires resolution by this Court. In addition, there is confusion and inconsistency in the trial courts throughout the country facing the task of administering excessive force cases because there is no clear methodology for them to follow. The result is a waste of precious judicial resources as the proper standard of determining qualified immunity is being litigated over and over again at both the summary judgment and trial levels. Certiorari is appropriate to establish a clear, simple, method for the trial courts to use in excessive force cases.

STATEMENT

The Petitioner makes a few statements of fact that deserve clarification. First, Dr. Katz did not resist arrest as has been claimed by Saucier. Saucier testified that Dr. Katz "resisted by putting his feet on the van's bumper and pushing away. So we had to use our heads putting him into the back of the vehicle." 25A (all factual citation is to Petitioner's brief) Dr. Katz's testimony, recognized by the courts below, was that he did not resist arrest: "Although Saucier disputes whether Katz resisted arrest, Katz says that he did not." 15A. Nor could Dr. Katz have pushed off the back of the bumper even if he had tried: The video shows that he did not do so, nor did he have time to do so. Finally, a sixty year old man with a fractured foot, no shoe and a splint, 27A, is unlikely to try to put pressure on it or be able to bear much weight upon it. As both the trial court and appellate court held, this is an issue of fact for the jury to decide. 27A, 15A ("From all that appears at this stage of the case, he did not pose an

immediate threat to the safety of the officers or anyone else.")

Second, Petitioner's statement claims that there was an "atmosphere of uncertainty" 29 that supports the reasonableness of the officers' actions as if Dr. Katz sprung up unknown to them. Both the trial court and the appellate court, however, acknowledged testimony given by the officers themselves that Dr. Katz was pointed out to them before they arrested him. 3A ("Saucier admits that Katz was 'pointed out as one of the potential, you know, activists' and that he knew 'who this person was . . . this person we need[ed] to keep an eye on.' ") 26A ("we pretty much had a heads-up on him, sir.").

Finally, Petitioner's statement that "respondent did not fall headlong into the van" 3, is inaccurate. Dr. Katz did fall headlong into the van which is clear from the trajectory on the video that can be seen when he is given a violent shove. Defendants have taken Dr. Katz's honesty and forthrightness in his explaining that he was able at the last moment to brace himself with his hands to prevent his face from hitting the floor and stretched it to a conclusion that he did not go in headlong – this is untrue.

REASONS FOR GRANTING THE PETITION

The primary reason for this Court to hear this case is that there is a significant split in the circuits that needs to be reconciled. Just as important, however, is that this Court hear this case to provide a clear, simple, uniform, methodology for the trial courts to handle the issue of qualified immunity in excessive force cases. The present disarray is causing unequal outcomes and a tremendous waste of judicial resources as qualified immunity is being litigated at least twice, sometimes three times (summary judgment, jury instructions and post trial motions), in every case. Petitioner has a fine set of appellate lawyers,

but they seem oblivious to the trial court ramifications of the convoluted standards they espouse.

Qualified immunity in an excessive force case should be argued once at the summary judgment stage. The trial judges should apply the immunity and it should be a high standard of protection to weed out meritless cases that do not deserve to go to trial. If there is a genuine question of fact for trial, however, then the decision of whether the officer acted in a reasonable manner is for the jury, using instructions based upon *Graham v. Conner*, 490 U.S. 386 (1989), and their decision should not be second guessed by the judge again applying qualified immunity through post trial motions.

Nowhere does Petitioner discuss the impact of his interpretation of qualified immunity upon trial, but Dr. Katz's counsel, having handled trials for both plaintiffs and defendants in excessive force cases, is well aware that this case is in part an effort by the defense bar to supplant the role of the jury in excessive force cases and have judges decide whether officers have acted reasonably using qualified immunity. Defense lawyers hope to accomplish this by, as they do in Petitioner's brief at page 18, arguing that the protection of qualified immunity has "wider boundaries" thereby giving officers greater protection than the *Graham* standard. Since it is the judge who decides the issue of qualified immunity, if the immunity decision is "wider" than the reasonableness analysis of *Graham*, and qualified immunity is applied post trial, then it is left for the judge to second guess the jury and decide whether an officer could have "reasonably thought he could act unreasonably" even if the jury has just decided that the officer acted unreasonably.

The entire "reasonably acted unreasonably" analysis is incomprehensible to the average person and makes a mockery of the jury's decision. Even to the able minds of the Justices and clerks of this Court, Petitioner's legal analysis regarding qualified immunity must seem

abstruse. Petitioner does not seem to appreciate how *Graham* clarified this area of law and is now muddling it up again. The United States, with its state and federal judiciaries, is fortunate to have one of the best, if not the best, group of judges of any country. But the issue for this Court to decide is not about the quality of the judges, it is about the proper role of the jury. Given the evidence on the video, Dr. Katz's own testimony, and officer Saucier's untruth that Dr. Katz was pushing off the rear bumper with his fractured foot to resist arrest, it simply is not the role of the trial court to decide whether Saucier acted reasonably – it is the role of the jury. The trial judge, D. Lowell Jensen, a former prosecutor, and judge David R. Thomson, writing for the appellate court, so concluded.

The outcome of this case should rest on fundamental bedrock principles: The power of the police and politicians to govern emanates from the people governed. If the famous words of Thomas Jefferson that "governments are instituted among men, deriving their just powers from the consent of the governed" are to be applied, then the people of the United States have given the police the power to arrest them and use force if warranted, but they have only given their consent based upon the assumption that it is they, not judges (no matter how outstanding they may be) that are to decide whether on officer has acted reasonably when there is a triable issue of fact concerning the use of excessive force. Any outcome that allows the judge to second guess the jury after it has applied the *Graham* standard is the height of judicial activism and violative of the seventh amendment.

The remaining question is what standard should be used by the trial judge at summary judgment to weed out the meritless cases. The answer is that the second prong of the qualified immunity test, reasonableness, should be used by the trial court to eliminate meritless cases. It is important, however, that a proper, objective test for reasonableness be used. Petitioner skews the test. Petitioner

states "[w]hatever one might think of the constitutionality of those uses of force, neither was so clearly unreasonable that no officer could have thought it to be lawful at the time." 24. This is an erroneous standard. It does not matter that the defendant can show that one or two officers would have thought the conduct reasonable. The reasonableness standard that this Court has set out for the trial courts is that of the generic reasonable officer – an objective standard. This was the beauty of *Graham*, it set forth an objective test that could be easily understood and applied. *Graham*, at the time it was decided, was not thought to be pro-defense or pro-plaintiff – it created a clear, workable, standard.

The Court should use this case to give the trial courts the following directions: First, determine whether the law was clearly established. Second, determine whether the reasonable officer could have thought the force used was reasonable. Third, if there is a genuine question of material fact precluding summary judgment, then the jury will determine the facts and decide whether the officer acted reasonably following instructions based upon *Graham*.

Respondent, Dr. Katz, looks forward to briefing these important issues for the Court so that the split in the circuits can be resolved through the creation of a clear, simple, method that is respectful of the important role of the jury.

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